

THE HON'BLE SRI JUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE S.ANANDA REDDY

WRIT PETITION No.26336 OF 2001

Date: 24-01-2006

Between:

M/s. Raasi Cement Limited,
A Public Limited Company,
Incorporated under the provisions of
Companies Act, 1956, having its
Registered Office at 5th Floor,
Minerva House, Secunderabad,
Rep.by its authorized representative,
Mr. M.S. Trivikrama Rao.
... Petitioner.

And

The Director General of Income Tax
(Investigation),
Aayakar Bhavan,
Hyderabad and another.
... Respondents

THE HON'BLE SRI JUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE S.ANANDA REDDY

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ORDER : (Per Hon'ble Sri Justice S.Ananda Reddy)

This writ petition is filed praying for the issue of Writ of Certiorari quashing the order dated 12-12-2001 in F.No.DGIT(INV)/IX(9)/WAIVER/REDUCTION/01-02, passed by the Director General of Income Tax, first respondent herein, as the same is illegal and unsustainable and for a consequential direction to the first respondent to waive the interest levied under the provisions of Section 234B and 234C of the Income Tax Act, 1961 (hereafter referred to as 'the Act') for the assessment years

1996-97.

The facts leading to filing of the present writ petition are as under.

The petitioner is a company registered under the provisions of the Companies Act, 1956, carrying on the business in the manufacture and sale of cement. For the assessment year in question, the petitioner company filed its return of income disclosing 'nil' income, though as per the Profit and Loss Account prepared under the provisions of the Companies Act, the petitioner company earned a profit of Rs.43,06,12,514/- and the same was adjusted against the brought forward loss on account of unadjusted depreciation and investment allowance of the earlier years. Subsequently, the petitioner filed a revised return of income on 31-3-1998, disclosing the taxable income of Rs.5,00,88,035/-. Finally, the assessment was made on

31-3-1999 under Section 143(3) of the Act, determining the taxable income of the petitioner/assessee at Rs.27,72,76,111/-. While completing the assessment, the Assessing Officer disallowed certain of the claims made by the assessee. The said assessment order was the subject matter of an appeal before the Commissioner of Appeals, who gave partial relief and the said appellate order was given effect to by the Assessing Officer revising the assessment on 7-3-2001, determining the taxable income at Rs.17,94,62,820/-. As the assessee failed to pay the advance tax, as contemplated under the provisions of the Act, the Assessing Officer levied interest both under the provisions of Section 234B and 234C of the Act. Aggrieved by the said levy of interest under the above two provisions of the Act, the assessee made an application to the first respondent under Section 119 of the Act, seeking waiver/reduction of the said interest levied by the Assessing Officer. The first respondent heard the petitioner and also considering the written representation made before him, passed orders rejecting the claim of waiver/reduction of interest observing that the case of the petitioner would not come under any of the clauses of the Circular order dated 23-5-1996 issued under Section

119 (2)(a) of the Act by the Central Board of Direct Taxes(CBDT). Aggrieved by the same, the petitioner has come up with the present writ petition.

Learned counsel for the petitioner Sri S.Ravi contended that the first respondent has committed a grave error in not appreciating the contentions advanced on behalf of the petitioner. According to the learned counsel, the increased taxable income was as a result of the dis-allowances made due to change of law in respect of certain of the issues, which are the subject matter of the earlier assessment years. As a result of the dis-allowances for the earlier years, the claim of the un-observed depreciation as well as the investment allowance was reduced and consequently the taxable income had gone up, which the petitioner did not anticipate. The learned counsel also contended that admittedly the assessments, for the assessment year 1991 onwards, were pending by the time the return for the assessment year in question was filed. Therefore, there was no occasion for the petitioner/assessee to estimate the probable income correctly and pay the advance tax, and therefore, the petitioner's case is squarely covered by the Circular order issued by the CBDT, which was intended to benefit the assessees like the petitioner. But however, the first respondent failed to appreciate the contentions advanced by the petitioner. The learned counsel further contended that one of the issues related to the power subsidy, which was treated as capital receipt till the matter was decided by the jurisdictional High Court, which was later confirmed by the Apex Court, and it is only thereafter the power subsidy was treated as revenue receipt, which had resulted in increase in the taxable income of the assessee, which the assessee was unable to contemplate. Similarly, with reference to certain of the interest paid or payable to the financial institutions, which is allowable in terms of Section 43B of the Act and the expenses of the prior period were also dis-allowed, which had resulted in increase in the total taxable income. Therefore, the first respondent ought to have taken into account all these aspects and if taken into account, there are justifiable circumstances under which the petitioner was unable to estimate correctly the income as well as the tax payable, and accordingly, failed to pay the advance tax,

therefore, the impugned order is liable to be quashed. The learned counsel further contended that though detailed written arguments have been presented before the first respondent, the first respondent failed to consider the same, therefore, the impugned order is liable to be quashed.

The learned senior standing counsel for the Department, on the other hand, supported the impugned order. It is contended by the learned counsel that the additions which had resulted in the assessment of the assessee are simple claims made by the assessee, which were dis-allowed either for want of material to substantiate its claim or the expenses claimed, which are not allowable. The Circular does not contemplate waiver/reduction of interest in the cases of this nature. The learned counsel also contended that the Circular is intended to benefit those assessees, who in fact, were unable to anticipate either as to the receipt of certain income during the relevant period when the amount of advance tax payable was due or in the cases of a change of law, which as per the earlier settled position, the assessee was not obligated to pay any advance tax in respect of a particular item of income. In the present case, neither of the situations were present and in the absence of such situations, the Circular issued by the Board, exercising the power under Section 119 of the Act, is not intended to benefit any of the assessees. The first respondent, having found that no such circumstances were present in the petitioner's case, has rightly rejected the application filed for waiver/reduction of the interest. The first respondent has considered the claim elaborately in the light of the specific clauses of the Circular and rejected the same, as the petitioner failed to fulfil any of the requirements to seek waiver/reduction of the interest. Therefore, the learned counsel sought to dismiss the writ petition.

In support of his contention, the learned counsel relied upon a decision of the Apex Court in **Novopan India Ltd. v. Collector of Central Excise and Customs, Hyderabad** where the Apex Court, while interpreting the notifications issued granting the exemption, held—

“Exemption being in the nature of exception to be construed strictly at the stage of determination whether assessee falls within its terms or not and in case of doubt or ambiguity, benefit of it must go to the State – But once the provision is found applicable to him, full effect must be given to it.”

Relying upon the above observations, the learned counsel contended that the Circular being an exception for waiving the liability to pay interest, it should be strictly construed, and in fact, it was so construed by the first respondent and accordingly denied the benefit of waiver/reduction, therefore, the same does not warrant any interference by this Court.

Heard both sides and considered the material on record.

The issue to be considered in this writ petition is whether the order of the first respondent refusing to grant the benefit of waiver/reduction of interest is just and proper. It is not in dispute that the assessee originally filed its returns declaring ‘nil’ taxable income. Later, may be after one year, filed its revised returns offering a taxable income of about Rs.5-00 Crores. But however, the assessment resulted in the final determination of a taxable income of the assessee at Rs.17,94,62,820/- after giving the benefit of the relief granted by the appellate authority. Admittedly, the petitioner did not pay the tax payable on the said income by way of advance tax, which would result in certain penal consequences as provided under Section 234B and 234C of the Act, and accordingly the interest contemplated under the above two provisions of the Act was levied. Therefore, the petitioner filed a petition for waiver/reduction of the interest claiming the benefit of the Circular issued by the CBDT (at page 106 of the paper book), exercising its powers under Section 119 of the Act. A perusal of the above Circular shows that the Chief Commissioners or the Director Generals are empowered to consider the applications for waiver/reduction of interest under certain specified circumstances provided therein and may consider for waiver/reduction of interest, if the authorities referred to above are satisfied that it is a fit case for waiver/reduction of the interest.

Now the petitioner in the present case claims that it is a fit case for waiver/reduction of interest, but the first respondent failed to exercise its jurisdiction for waiving the same. In order to appreciate the contention, it is proper to refer to the relevant part of the Circular issued.

Para-2 of the Circular provides for waiver/reduction of interest under five specified circumstances enumerated under clauses (a) to (e). Under clause (a), the specified circumstance is a case of search and seizure under Section 132 of the Act, where the Books of Account and other incriminating documents have been seized as a result of which the assessee was unable to furnish the return for the previous year during which the action under Section 132 of the Act has taken place. Under clause (b) where the assessee failed to pay the instalments as a result of the same search and seizure of cash. Similarly, under clause (e), in a case where the return of income could not be filed by the assessee due to unavoidable circumstances, but filed the said return voluntarily either by the assessee or by his legal heirs without detection by the Assessing Officer.

Admittedly, the above three situations are not present in the petitioner's case. Therefore, they are not applicable to the present case. The other two clauses are clause (c) and (d) and it would be appropriate to extract the above two clauses.

(c) Any income chargeable to income-tax under head of income, other than "Capital gains" is received or accrued after due date of payment of the first or subsequent instalments of advance tax which has neither anticipated nor was in the contemplation of the assessee and the advance tax on such income is paid in the remaining instalment or instalments and the Chief Commissioner or Director General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of interest chargeable under section 234C of the Income-tax Act.

(d) Whether any income which was not chargeable to income-tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income-tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or as the case may be, the decision of Supreme Court in his own case, which event has taken place after the end of any such previous year, in any assessment or re-assessment proceedings, the advance tax paid by the

assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable to interest under section 234B or section 234C and the Chief Commissioner or Director General is satisfied that this is a fit case for reduction or waiver of such interest.

A perusal of clause (c) shows that this clause applies where any income chargeable to tax under the head of income other than 'Capital gains' is received or accrued after due date of payment of the first or subsequent instalments of advance tax which has neither anticipated nor was in the contemplation of the assessee, as a result of which the advance tax on such income was not paid in the instalments due prior to the date of the receipt of such income, but advance tax on such income is paid in the remaining instalment or instalments. While clause (d) deals with the case where any income which is not chargeable to income tax on the basis of an order in the assessee's own case by the jurisdictional High Court as a result of which he did not pay any income tax in relation to such income in any previous year, but however, subsequently in consequence of any retrospective amendment of law or as the case may be, the decision of the Supreme Court in his own case which event has taken place after the end of such previous year, which had resulted in the short-fall of the advance tax payable and in such cases, the interest payable under Section 234B and 234C can be waived/reduced if the authorities competent are satisfied.

If we examine the case of the petitioner, his case is not that the assessee received any income which was not anticipated or in the contemplation. When such is the situation, clause (c) has no application. Similarly, with reference to clause (d), though a faint argument was advanced at the time of hearing that the power subsidy received by the assessee was treated as 'capital receipt' prior to the decision of the jurisdictional High Court in **Sahney Steel & Press Works Ltd. v. C.I.T.** which was upheld by the Apex Court, and subsequently the same was treated as revenue receipt. But a perusal of the material on record including the affidavit where the disallowed items are specified by the assessee itself in para-6, does not contain the item of power subsidy, which was treated as revenue receipt by way of disallowance. In fact, this issue was not at all raised before the first respondent while considering the waiver application. What was raised and considered by the first

respondent was that the assessments for the earlier years were not completed, as a result of the completion of the assessments for the earlier years, the un-observed depreciation and investment allowances have got reduced which had resulted in increase in the taxable income for the assessment year in question. The first respondent has considered this contention and rejected on the ground that this situation is not covered by any of the clauses of the Circular issued by the CBDT. Therefore, it is not open to the petitioner to advance an argument, which it did not raise before the first respondent, even assuming such an issue was available. The major cause for the increase in the taxable income was dis-allowance of inadmissible expenses claimed for deduction by the assessee. If such claims were made, which were dis-allowed, as a result of which the taxable income had increased, the assessee is liable for the consequential penal action. In fact, the interest collected by the Department, as contemplated, is only in the nature of compensatory for withholding the amount, which the petitioner was liable to pay to the Department during the financial year relevant to the assessment year 1996-97. In fact, at the time of hearing, the learned counsel has fairly conceded that the items with reference to which the petitioner sought for waiver/reduction is not directly covered by the Circular, but however, the learned counsel sought to extend or expand the Circular so as to cover the cases where the taxable income had gone up as a result of dis-allowances of the claims. When the beneficial Circular does not contemplate that such assesseees are entitled to any benefit of waiver/reduction of the interest payable under Section 234B and 234C of the Act, there are absolutely no justifiable circumstances either to extend or expand the scope of the Circular so as to cover such assesseees. As observed by the Apex Court, the beneficial Circulars, which are in the nature of exceptions, conferring the benefit, have to be construed strictly. If such strict construction is applied to the Circular in question, the case of the petitioner would not at all come within the purview of the Circular relied upon by the petitioner.

Under the above circumstances, we do not find any illegality or irregularity in the order passed by the first respondent rejecting the claim of waiver/reduction of the

interest under Section 234B and 234C of the Act.

The writ petition is devoid of merit and the same is accordingly dismissed. No costs.

(BILAL NAZKI, J)

(S.ANANDA REDDY, J)

Date: 24-01-2006.

Msr.

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AND
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(Prepared by Hon'ble Sri Justice S.Ananda Reddy)

Dt: 24-01-2006

(Msr)